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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ROMAN SUNDAY, SR.,

Petitioner.

Y.

D. K. SISTO, Warden,

Respondent.

C 07-05308 SBA (PR)

**MOTION TO DISMISS
UNTIMELY PETITION FOR
WRIT OF HABEAS CORPUS**

INTRODUCTION

21 Respondent moves to dismiss the petition for writ of habeas corpus. The petition is
22 untimely, as it was filed beyond the one-year statute of limitations set forth in 28 U.S.C. § 2244(d).
23 A motion to dismiss in lieu of an answer on the merits is appropriate where the petition is
24 procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989); *O'Bremski v. Maass*,
25 915 F.2d 418, 420 (9th Cir. 1990); Rules Governing 28 U.S.C. § 2254 Cases, Rule 4, and Advisory
26 Committee Notes; *see also Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (motion
27 to dismiss proper if time bar is clear from face of complaint). Respondent has not noticed a hearing
28 date because petitioner is an incarcerated state prisoner who is representing himself in this case.

PROCEDURAL BACKGROUND

2 On April 3, 2001, the District Attorney of Contra Costa County filed an information
3 against petitioner Roman Sunday, Sr. Count 1 charged murder, in violation of Cal. Penal Code §
4 187(a). Count 2 charged kidnapping a child under the age of 14, in violation of Cal. Penal Code §§
5 207(a) and 208(b). Count 3 charged unlawful possession of a firearm by a felon, in violation of Cal.
6 Penal Code § 12021(a)(1). In connections with counts 1 and 2, the information specially alleged that
7 petitioner used a firearm within the meaning of Cal. Penal Code §12022(a)(1). The information
8 further alleged that petitioner had suffered two prior strike convictions within the meaning of Cal.
9 Penal Code §§ 667(b)-(i) and 1170.12, and had suffered two prior serious felony convictions within
10 the meaning of Cal. Penal Code § 667(a)(1).

11 On August 13, 2002, a jury convicted petitioner of first degree murder on count 1, and
12 found him guilty as charged on the other two counts. The jury further found the associated firearm
13 use allegations to be true.

14 On September 12, 2003, the trial court found the prior felony conviction allegations to be
15 true. The court sentenced petitioner to state prison for the total indeterminate term of 86 years to life.
16 Petitioner appealed.

17 On June 22, 2005, the California Court of Appeal affirmed petitioner's conviction. Exh.
18 A.

19 On July 26, 2005, petitioner filed a petition for review. Exh. B. On October 12, 2005, the
20 California Supreme Court issued an order denying the petition. Exh. B.

21 On November 13, 2006, petitioner filed a petition for writ of habeas corpus in Contra
22 Costa County Superior Court. Exh. C. The court denied the motion on December 21, 2006. Exh.
23 C

24 On April 16, 2007, petitioner filed a petition for writ of habeas corpus in the California
25 Court of Appeal. Exh. D. On April 18, 2007, the state court denied the petition as untimely, citing
26 *In re Clark*, 5 Cal.4th 750 (1993), and *In re Robbins*, 18 Cal.4th 770 (1998). Exh. D.

27 On April 26, 2007, petitioner filed a petition for writ of habeas corpus in the California
28 Supreme Court. Exh. E. On September 12, 2007, the state court denied the petition. Exh. E.

1 On October 18, 2007, petitioner filed the instant petition pursuant to 28 U.S.C. § 2254.

2 **ARGUMENT**

3 **THE INSTANT PETITION IS UNTIMELY AND DISMISSAL WITH**
 4 **PREJUDICE IS REQUIRED**

5 Petitioner filed the instant petition on October 18, 2007. Accordingly, this case is
 6 governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which applies
 7 to all cases filed after its effective date of April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320 (1997).
 8 The AEDPA imposed a one-year statute of limitations on the filing of habeas petitions in federal
 9 court. 28 U.S.C. § 2244(d). The year commences on “the date on which the judgment became final
 10 by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C.
 11 § 2244(d)(1)(A). The time for seeking direct review includes the 90-day period within which a
 12 petitioner can file a petition for a writ of certiorari from the United States Supreme Court under
 13 Supreme Court Rule 13, whether or not the petitioner actually files such a petition. *See Bowen v.*
 14 *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The judgment therefore became final on January 10,
 15 2006.

16 The limitations period is statutorily tolled during the period of time in which a properly
 17 filed application for state post-conviction or other collateral review with respect to the pertinent
 18 judgment or claim is pending. 28 U.S.C. § 2244(d)(1)(A), (d)(2). Tolling generally continues during
 19 “the intervals between a lower court decision and the filing of a new petition in a higher court.”
 20 *Carey v. Saffold*, 536 U.S. 214, 223 (2002). A federal habeas petitioner is entitled to tolling when
 21 he is “invoking one complete round of the State’s established appellate review process” in order to
 22 exhaust state court remedies. *Id.* at 220.

23 Here, the limitations period, which commenced on January 10, 2006, ran for 307 days,
 24 until petitioner filed a habeas petition in the Santa Clara County Superior Court on November 13,
 25 2006. The statute was tolled for 38 days, ending with the court’s denial of the petition on December
 26 21, 2006.

27 On April 16, 2007, petitioner filed a petition for writ of habeas corpus in the California
 28 Court of Appeal. However, the state appellate court denied the petition as untimely on April 18,

1 2007, citing *In re Clark*, 5 Cal.4th at 782-99, and *In re Robbins*, 18 Cal.4th at 780. Exh. D. When
2 a state court rejects a state postconviction proceeding as untimely, it is not “properly filed” within
3 the meaning of the statutory tolling provisions of 28 U.S.C. § 2244(d)(2). *Pace v. DiGuglielmo*, 544
4 U.S. 408, 417 (2005). Indeed, “a petition filed after a time limit, and which does not fit within any
5 exceptions to that limit, is no more ‘properly filed’ than a petition filed after a time limit that permits
6 no exceptions.” *Id.* at 1812; *see also Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir. 2007); *Bonner*
7 *v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005) amended 439 F.3d 993 (9th Cir. 2006). The April 16,
8 2007, state habeas petition therefore could not, and did not, toll the applicable limitations period.

9 The record accordingly establishes that the limitations period, which commenced on
10 January 10, 2006, ran for 307 days, then was tolled for 38 days by petitioner’s filing of a habeas
11 petition in the Contra Costa County Superior Court on November 13, 2006. This extended the
12 federal deadline to February 17, 2007. No further statutory tolling occurred. The instant federal
13 petition is untimely by eight months, and must be dismissed with prejudice. *See Green v. White*, 223
14 F.3d 1001, 1002 (9th Cir. 2000).

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CONCLUSION

For the foregoing reasons, respondent respectfully requests that the order to show cause be discharged, and the petition be denied.

Dated: September 9, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

/s/ Dorian Jung
DORIAN JUNG
Deputy Attorney General

Attorneys for Respondent

EXHIBIT A

CALIFORNIA APPELLATE COURTS

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Opinions

The People v. Sunday

Division 5

Case Number A104520

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Date	Description	Notes
11/13/2003	Notice of appeal lodged/received (criminal).	
11/13/2003	Notice to reporter to prepare transcript.	dated 11/6/2003
01/07/2004	Counsel appointment order filed.	Atty McCabe aptd for aplt. Sunday. ind./40
02/20/2004	Court reporter extension requested.	by CSR Beth Grant #10943; extension requested to 3/1/2004
02/23/2004	Court reporter extension granted.	Reporter: Grant, Beth (010943). Deadline extended to: 03/01/04.
04/05/2004	Notice of record completion received.	
04/05/2004	Record on appeal filed.	c-3-r-8 (boxed record) r-1 sealed proceedings dated 8/12/2002 (pages 1317-1320)
04/05/2004	Probation report filed.	(1)
05/18/2004	Default sent to court appointed counsel.	
05/25/2004	Motion/application to augment record filed.	1)RT of in camer hearing with juror #1 on 8-12-02, 2)RT of opening statement ob prosecutor. 3)Transcript or in alternative copy of video tape of interview with Sunday Jr.play by prosecution. 4)Copy of exhibits 40,40A,40B and 41. Plus REX of 30 days from ARF to file AOB
05/25/2004	Requested - extension of time.	Attorney: McCabe, John Party: Sunday, Roman
05/27/2004	Augmentation granted. (See order.)	arf due 30 days/aob due 30 days later.
06/29/2004	Telephone conversation with:	superior court/tapes are copied/they will contact two rpts on their progress.

07/12/2004	Telephone conversation with:	Beverly stepped away/she will call me back.
07/12/2004	Telephone conversation with:	Beverly will be transmitting this augment either today or early tomorrow.
07/26/2004	Telephone conversation with:	superior court/court clerk is trying to locate the priors/they will submit a rex.
08/05/2004	Telephone conversation with:	superior court/rex is in the works/up for appellate suvisng judge's signature.
08/18/2004	County clerk extension requested.	as to augmentation; to 9/8/2004
08/19/2004	County clerk extension granted.	as to augmentation; extension granted to 9/8/2004
09/14/2004	Telephone conversation with:	superior court/will do a clerk's certificate as to the priors not being able to be located.
09/16/2004	Letter sent to:	all counsel/augment filed/aob due 10-18-04.
09/21/2004	Exhibits lodged.	clerk's certificate as to request 1 and 4/people's exh 39 (tape) and rpt's tx for 07-22-02.
09/23/2004	Motion filed.	To unseal record and REX for AOB.
09/23/2004	Requested - extension of time.	Attorney: McCabe, John Party: Sunday, Roman REX is for an additional 30 days after the court's ruling on the mot. to unseal the record as to the 8-12-04 RT.
09/27/2004	Order filed.	Aplts mot/unseal portions of the RT is grntd. Pages 1314- 1320 of proceedings held 8-12-02 are ordered unsealed,clerk to transmit copy to counsel for aplt. If aplt raises and issued respond. to be sent a copy upon req. Aplts req/EOT denied AOB due 10-18-04 per 17a1.
10/08/2004	Requested - extension of time.	Attorney: McCabe, John Party: Sunday, Roman
10/08/2004	Granted - extension of time.	Attorney: McCabe, John Party: Sunday, Roman
10/26/2004	Appellant's opening brief.	Attorney: McCabe, John Party: Sunday, Roman
12/01/2004	Respondent notified pursuant to rule 17(a)(2).	
12/03/2004	Respondent's brief.	Attorney: Office of Attorney General Party: The People
12/15/2004	Requested - extension of time.	Attorney: McCabe, John Party: Sunday, Roman
12/16/2004	Granted - extension of time.	Attorney: McCabe, John

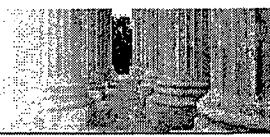
		Party: Sunday, Roman
01/12/2005	Appellant's reply brief.	Attorney: McCabe, John Party: Sunday, Roman
01/12/2005	Case fully briefed.	
01/19/2005	Oral argument waiver notice sent.	
01/25/2005	Request for oral argument filed by:	Atty McCabe for aplt. Sunday.
02/03/2005	Record to court for review.	
04/13/2005	Calendar notice sent. Calendar date:	5/19/05 at 11:00 a.m.
04/18/2005	Request filed to:	continue oral argument, filed by Deputy A.G. Jung.
04/21/2005	Argument continued to:	June 15 or 16 2005 calendar, counsel to be notified.
04/21/2005	Order filed.	Reapondent's request to continue oral argment is granted. Oral argument originally scheduled for 5-19-05 is ordered rescheduled and will be heard on June 15th or 16th 2005 calendar. Counsel will be notified upon determiation of the exact date and time.
05/12/2005	Calendar notice sent. Calendar date:	6-15-05 at 11:00 am
06/22/2005	Opinion filed.	The judgment is affirmed.
07/26/2005	Petition for review in Supreme Court received.	
08/05/2005	Record transmitted to Supreme Court.	
09/22/2005	Supreme Court order filed re:	S135861/time to grant or deny review is extended to 10-24-05 or later.
10/13/2005	Petition for review denied in Supreme Court.	S135861
10/13/2005	Remittitur issued.	
10/13/2005	Case complete.	
12/23/2005	Record returned from Supreme Court.	
02/10/2006	Exhibits returned to:	envelope
02/15/2006	Shipped to state retention center, box # / list #:	L204

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EXHIBIT B

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PEOPLE v. SUNDAY

Case Number S135861

Opinions

Date	Description	Notes
07/26/2005	Petition for review filed	By counsel for defendant (Roman Sunday, Sr.,)
07/26/2005	Record requested	
08/05/2005	Received Court of Appeal record	file jacket/briefs/sealed envelope/one box
09/20/2005	Time extended to grant or deny review	to and including October 24, 2005, or the date upon which review is either granted or denied.
10/12/2005	Petition for review denied	

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EXHIBIT C

Roman Sunday Sr., V-11338
CSP-SOL III, 1-106
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Vacaville, Ca. 95696-4000

SUPREME COURT
LODGED EXHIBITS

APR 26 2007

S152252

THE CALIFORNIA COURT OF APPEALS

Deputy

FIRST APPELLATE DISTRICT DIVISION FIVE

ROMAN SUNDAY SR.,

CASE NO. 061448-7

Petitioner

PETITIONERS OBJECTION TO
SUPERIOR COURTS DECISION
IN RE, HABEAS CORPUS

v.

D.K. SISTO, Warden,

Respondent.

On November 13, 2006, the petitioner filed a Writ of Habeas Corpus in the Superior Court of California in and for the County of Contra Costa, on December 21, 2006, the petitioner's Writ of Habeas Corpus was denied, see attached document.

The petitioner respectfully objects to the decision of the Superior Court Judge Theresa Canepa, and appeals to the California court of Appeals, First Appellate District Division Five. The petitioner was transferred from Calipatria State Prison to CSP-Solano therefore causing a slight delay in petitioner's research time and preparation of his Pro Se Writ of Habeas Corpus for this he apologizes, though no fault of his own.

ARGUMENT I

The petitioner object to the decision of the Honorable Judge Theresa Canepa's denial of his Pro Se Writ of Habeas Corpus. The

medical records in question should have been submitted at the time of trial, however because of ineffective counsel this was not done, had the evidence that is now available been available at the time of trial it is extremely unlikely that the petitioner would be incarcerated.

Petitioner cites (2006 WL 2325130, HOVEY V. AYERS CAL 2006)

"The clear implication of the prosecutions argument was that Dr. Satten was uninformed about the subject of his diagnosis and his conclusions stemmed from a general misunderstanding of the facts. Even if the background information did not change Dr. Satten's diagnosis, he at least would have been able to testify more knowledgeably about the case and better, whether the prosecution's attempts to discredit him. He would have been able to anticipate the prosecution's questions during cross examination and explain how Hovey's activities around the time of the offense could be consistent with schizophrenia. Instead, Dr. Satten was caught by surprise, in an embarrassed and vulnerable situation. He was entirely discredited by his lack of critical information, that lay in the hands of Hovey's counsel. (BEAN V. CALDERON), 163 F 3d 1073, 1080-81 (9th Cir. 1998) (Finding prejudice where counsel failed to adequately prepare mental health experts, whose testimony was, as a result, "less than persuasive at best ... and a seeming artifice at worst" (internal quotation marks omitted)).

In the present case, before and during the time of petitioners trial between July 15 thru August 2002 his mental health records that were critical to petitioners defense were misplaced and were not located until December 2004, See Exhibit A. Further the entire medical file was very recently turned over to the petitioner via. U.S. Postal Services from Dr. Nathan Hare, Ph. D., who is a licensed clinical psychologist, See Exhibit B.

The recently acquired medical records would have undermined the prosecutions case. The defense presented evidence of

petitioners mental disorder which makes it unlikely that he actually formed the requisite criminal intent necessary to prove he aided and abetted in the murder and kidnapping, RT 959-963.

The prosecution used evidence that petitioner exaggerated his symptoms therefore discrediting his mental disorder, See RT 974, 1261-1264. However, according to the newly acquired medical records petitioner actually minimized his symptoms. The defense's expert witness Dr. Lerchin, had to testify to petitioners mental disorder with a very limited amount of factual information in regards to the petitioners background, like in *Hovey v. Ayers*, Dr. Lerchin's testimony was the sole vehicle for presenting robust evidence about petitioners mental condition, the jury was left with the erroneous impression that petitioner may have been attempting to fabricate a defense of mental illness notwithstanding, had the trial court or counsel recommended a postponement of some sort while these medical records were located and turned over to the prosecution and Dr. Lerchin, who was the mental health expert called for his expert opinion. Then the outcome of petitioners trial would have been different. The petitioner respectfully requests that his case be vacated and remanded for a new trial.

ARGUMENT II

Petitioner raised a claim of ineffective assistance of counsel contending that counsel failed to raise objections to gruesome photos.

Petitioner reiterates that his imprisonment is unlawful and violates the 6th Amendment under the United States Constitution. The petitioner further object so the Superior Courts decision.

Petitioner contends not only did trial counsel fail to object of gruesome photos he failed to properly investigate and locate critical evidence that was key to petitioners defense. Trial counsel called Dr. Lerchin to testify to the petitioner's history of mental health, however he failed to give the exert witness the material that was crucial in proving his case, See RT 982-983. Petitioner cites 2006 WL 2325130, Hovey v. Ayers Cal 2006.

Hovey argues that he received ineffective assistance of counsel during the penalty phase because his attorney failed to adequately investigate and resent evidence of Hovey's mental condition at and around the time of his crime. Hovey contends that counsel failed to provide his psychiatric expert, Dr. Satten with key information about Hovey's mental health history and failed to adequately prepare Dr. Satten to testify. As a result, the testimony of his key penalty-phase witness was undermined, and his mitigation case was substantially prejudiced. The district court concluded that although counsel's performance was deficient, Hovey was not prejudiced by the deficiency.

For the reasons discussed below, we disagree with the district courts prejudice analysis, and we conclude that Hovey is entitled to habeas relief on his claim. (FN2)

In the present case, the petitioner's expert witness was ill-prepared to put forth a proper diagnosis of the petitioners mental disorder because trial counsel failed to properly investigate and secure the petitioner's medical records from

96 Cal. Rptr. 2d 843.)

The petitioner prays that upon further review that he be granted a reversal and new trial or at the very least an evidentiary hearing.

Respectfully submitted,

Date: April 24 , 2007

Roman Sunday Sr.
Roman Sunday Sr.

EXHIBIT D

CALIFORNIA APPELLATE COURTS

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In re Sunday on Habeas Corpus.

Division 5

Case Number A117404

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Date	Description	Notes
04/16/2007	Petition for a writ of habeas corpus filed.	
04/18/2007	Order denying petition filed.	BY THE COURT: The petition for writ of habeas corpus is denied. (In re Clark (1993) 5 Cal.4th 750, 782-799 [Grounds 1 and 2]; In re Robbins (1998) 18 Cal.4th 770, 780 [Grounds 1 and 2]; In re Swain (1949) 34 Cal.2d 300, 303-304 [Grounds 1 and 2]; People v. Duvall (1995) 9 Cal.4th 464, 474 [Grounds 1 and 2]; In re Lindley (1947) 29 Cal.2d 709, 723 [Ground 1].)
04/18/2007	Case complete.	
03/18/2008	Shipped to state retention center, box # / list #:	L274

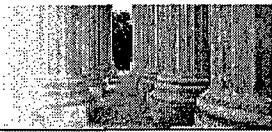
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SUNDAY (ROMAN) ON H.C.

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Date	Description	Notes
04/26/2007	Petition for writ of habeas corpus filed	Roman Sunday, Sr., petitioner in pro per
04/26/2007	Exhibit(s) lodged	1 volume
09/12/2007	Petition for writ of habeas corpus denied	The petition for writ of habeas corpus is denied. (See <i>In re Swain</i> (1949) 34 Cal.2d 300, 304; <i>People v. Duvall</i> (1995) 9 Cal.4th 464, 474.)

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